SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

October Term, 1968

No. 1055

DAVIE FRANKLIN WILSON,
*Petitioner,*

v.

STATE OF WASHINGTON,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Washington

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**To the Supreme Court of the State of Washington**

## I.

## OPINION BELOW

The opinion of the Supreme Court of Washington is reported in 74 W.D.2d 244, July, 1968.

## II.

## JURISDICTION

Petitioner invokes the jurisdiction of this court under 28 U.S.C. §1257(3) and Rule 22(1). Respondent contends that petitioner has not and cannot comply with the requirements of Rule 23(1)F as set forth in the argument below.

## III.

## QUESTION PRESENTED

Does a determination by a state court based on state law that the defendant waived his right to appeal the trial court's ruling on a motion to dismiss at the conclusion of the prosecution's case by testifying on his own behalf as to facts relevant to the case raise a federal question under the 5th and 14th Amendments to the U.S. Constitution?

## IV.

## STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case with the following addition. The two stores located at Nos. 3 and 1 Boston are within the same building, separated by a common wall.

## V.

## ARGUMENT

Respondent's argument against granting a writ of certiorari in this case is incorporated in the following sections.

### A. Petitioner Has Not Raised a Substantial Federal Question

The function of the petition is to satisfy the court that the case comes within one of the classes set forth in the Revised Rules of the Supreme Court of the United States, Rule 19, 1(a), which states:

> Where a state court has decided a federal question of substance not theretofore decided by this court

> or has decided it in a way probably not in accord with applicable decisions of this court.

A petition for certiorari should explain why it is vital that the question involved be settled by the Supreme Court. Petitioner's attempt to show that the decision below may have been erroneous does not fulfill the requirements of Rule 19.

Petitioner has broadly claimed a denial of due process in his question presented but has failed to substantiate his claim, nor has he presented any authority that it is sufficiently important for the Supreme Court to review, or that the decision below calls for an exercise of the Supreme Court's supervisory powers.

Respondent contends that petitioner has failed to show in his petition that the sole question presented here comes within the classes set forth in Rule 19. There has been no showing that the Washington Supreme Court has decided a substantial federal question not previously decided by this court nor has there been any showing that the state court decided a substantial federal question in such a manner as to conflict with applicable decisions of this court. In fact, petitioner cites no Federal decisions in his petition for a writ of certiorari.

Since petitioner has not shown that the question presented is a vital and important question or that there exists a conflict of decision, respondent respectfully contends that the petition fails to establish jurisdictional grounds upon which this court can grant the writ.

**B. The Decision of the Washington Supreme Court Was Based on Adequate State Grounds**

It is a well-settled rule that the United States Supreme Court will not review a decision of a state court that is based on an adequate state ground, even though it also could have been decided on a federal ground. *Williams v. Kaiser,* 323 U.S. 471, 89 L.Ed. 398, 54 S.Ct. 363 (1944); *Dixon v. Duffy,* 344 U.S. 143, 97 L.Ed. 476, 73 S.Ct. 193 (1952); *Honeyman v. Hanan,* 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 350 (1936).

The Washington State Supreme Court's decision as set forth in the petition in appendix A is incorporated by reference herein. The Washington State Supreme Court's decision was based solely on the Washington rule set forth in numerous Washington opinions that a defendant's testimony as to facts relevant to the case in question constitutes a waiver of an appeal from the trial judge's denial of his motion to dismiss. The Washington opinion cited no federal cases, no federal statutes, or the United States Constitution. The opinion does not discuss nor make mention of any federal question.

**C. No Federal Question Was Properly Raised at Any Time in the Proceedings Below**

It is also the well-established practice of this court that it will not review decisions in which the federal question was not raised at either the trial or the appellate level. *Edelman v. California,* 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953); *Barbour v. Georgia,* 249 U.S. 454, 63 L.Ed. 704, 39 S.Ct. 316 (1919).

The provisions of Rule 23(1)F of the Revised Rules of the Supreme Court of the United States require that

the petitioner (for certiorari) set out in the statement of the case

> . . . the stage in the proceedings in the court of the first instance and in the appellate court, at which, and the manner in which the federal question sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to change and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exceptions thereto, assignment of errors); as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The fact that petitioner raised not a single federal question at the trial level nor in the proceedings before the Washington State Supreme Court demonstrates clearly that no question, let alone one of federal substance was raised at either the trial or appellate level.

The petitioner in this case has not and it is submitted, cannot comply with the quoted provisions of Rule 23 above. The decision of the state court was based entirely upon the law of the state of Washington and no federal question was ruled upon by the state court nor was it necessary to its decision.

## VI.

## CONCLUSION

It is the petitioner's burden to prove (1) that a substantial federal question is involved; (2) that the question was raised at the appropriate time in the proceedings

below; (3) that the lower court ruled on that federal question; and (4) that such ruling was in conflict with applicable decisions of this court. Since petitioner has failed to meet these requirements and it is clear from the record of this case that he cannot do so, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

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JAMES E. KENNEDY
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*Attorneys for Respondent*